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Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 28.

WESTERN FUEL COMPANY, A CORPORATION,
Petitioner,

against

ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED,
Respondent.

BRIEF FOR PETITIONER.

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Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1921.

WESTERN FUEL COMPANY, a Corporation,
Petitioner,

AGAINST

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, deceased,
Respondent.

No. 28.

BRIEF FOR PETITIONER.

Statement.

This case is here upon Writ of *Certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit.

Facts.

Manuel Souza while engaged in unloading coal from the Steamer *Tancred* on August 5, 1916, was killed by falling coal. The steamer, which was a Norwegian vessel under charter to the Western Fuel Company, was at anchor in Oakland Creek, a navigable tributary of the Bay of San Francisco.

Two gangs were engaged in the unloading of the boat, each gang consisting of an engineer, a dump-

man, a hatch-tender and stevedores who filled the buckets in the hold (pp. 64, 78, 91, 92).

Costa was the hatch-tender for one gang and Duarte hatch-tender for the other (pp. 58, 64, 95). Souza was a member of the same gang with Duarte and at the time of the accident that gang was getting ready to go to work and the other gang was getting ready to quit (pp. 64, 96, 98). Souza, however, had gone to work a little ahead of time in order to take the place of a friend of his in the other gang, so that the latter might change his clothes (p. 86).

It was the duty of the hatch-tender to watch the loading of the bucket, and when it had been completed to signal the engineer and to watch thereafter so that if any coal fell from the bucket or the hopper or anything else went wrong he might warn the workmen in the hold (pp. 58, 60, 63, 68, 69, 92, 118).

The hoisting engineer was stationed in a tower about 70 or 80 feet above the deck of the steamer and at a signal from the hatch-tender applied the electric power to raise the bucket (p. 117). The engineer in the gang that was working at the time was Hayes. The dump-man stood near the hopper about 70 feet above the deck of the steamer, and when the bucket was over the hopper he would pull a clutch which would cause the bucket to dump (p. 103).

When the workmen in the hold had filled a bucket with coal the hatch-tender would signal to the hoisting engineer, and the engineer would then apply the electric power which would lift the bucket from the hold perpendicularly to the yard arm which extended from the side of the bunker, where the bucket would hang suspended by ten or twelve feet of cable from the yard arm (pp. 57, 109, 117,

118, 144). The engineer would then release an automatic brake which would cause the bucket to run in on a carrier by means of gravity to a position over the hopper (p. 118). The hopper extended out about twelve feet from the side of the bunker, and had a lip about eight feet wide. The bucket, about 3½ feet square and about 3 feet high, cleared the lip of the hopper by about 2 feet and swung in about 6 feet from the lip (pp. 107, 108, 110, 119). When the bucket reached its proper position the dump-man standing on a plank at the top of the hopper would pull a clutch which was attached to the bucket, and the contents of the bucket would then empty into the hopper (pp. 103, 109). Nelson was the dump-man in the gang working at the time of the accident.

The hoisting machinery in use at the time of the accident had been installed some four or five months prior thereto and was the most modern and best adapted for the purpose known, and the equipment was in good order (p. 143). No contention is made that there was any negligence on the part of the petitioner in the equipment or its condition.

Immediately prior to the accident a bucket had been filled, and had been attached to the cable; Costa had signaled Hayes, the engineer, and the bucket had been hoisted (pp. 60, 63). When it had reached its position over the hopper Nelson pulled the clutch and, according to the testimony of one of the witnesses for the respondent, as the dump-man pulled the clutch the bucket started back on the carrier and half of the coal fell in the hopper and half outside (pp. 74, 75, 78, 79). Part of that which fell outside struck and killed Souza who was in the hold of the ship.

This bucket hanging from the yard-arm by a twelve foot cable has a certain amount of swing

to it, and Nelson and Hayes testified that as the clutch was pulled the bucket swung half way around causing some of the coal to fall outside of the hopper (pp. 106-109, 110, 121, 139, 140).

It is impossible for the bucket when it has reached its position above the hopper to start back unless the engineer moves it by means of electricity (p. 125). Hayes testified that he had not moved the bucket and as this was the last one to be emptied on his shift, there was no occasion for him to move it (pp. 120, 124, 126).

All the witnesses agreed that coal is constantly falling either from the bucket or the hopper, and that the work is dangerous, but no one had ever seen such a large amount of coal fall before (pp. 69, 70, 87, 92, 97, 98). Souza had worked at unloading coal for years and had on many occasions acted as hatch-tender looking out for the bucket, watching for falling coal and warning the members of the gang in such event (pp. 66, 87, 88). Costa, the hatch-tender at the time of the accident, was in the hold instead of being above and he could not see what was going on, but as he testified, "There was a man that was working for me who hollered ahead of time and they couldn't get away" (pp. 59, 88).

Issues.

The respondent's cause of action was based upon the Statutes of the State of California giving a right of action for wrongful death (Section 377, Code of Civil Procedure; Section 1970 of Civil Code of California.

Code of Civil Procedure, Section 377, is as follows:

> "Section 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal rep-

resentatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Section 1970 of the Civil Code reads as follows:

"Section 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; provided nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive-engine, or other appliance than that upon which the employee who is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine-shop, or other industrial establishment.

"Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.

"When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representatives of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order or precedence as herein stated, but no more than one action shall be brought for such recovery.

"Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

"The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

In 1911 the California legislature passed the so-called Roseberry Act (Stats. 1911, p. 796), which provides in part:

"Section 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line

of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.

"Section 2. No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this act."

The pertinent sections of the Statute of Limitations of the State of California are in the Code of Civil Procedure.

Section 340, Subdivision 3, is as follows:

"Within One Year:

"3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check."

Section 355, is as follows:

> "If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

The respondent claimed that Section 1970 of the Civil Code and the Roseberry Act, the first of which took away the fellow servant defense under certain circumstances, and the latter of which abolished the defenses of assumption of risk, negligence of a fellow servant and contributory negligence, should be applied. The petitioner contended to the contrary.

The District Court in rendering its decree applied the provisions of the statutes above quoted, except the statute of limitations, particularly the Roseberry Act, which abolishes the doctrine of assumption of risk and the defense that the accident was caused by the negligence of a fellow servant.

Proceedings.

The accident and death of Souza occured August 5, 1916. April 25, 1917, the Industrial Accident Commission of the State of California, after proceedings taken before it, made an award in favor of Mary Souza, the widow, against the Western Fuel Company for a certain sum of money, from which award the Western Fuel Company sued out a petition for writ of review by the Supreme Court of the State of California, which said court on August 6, 1917, made an order annulling and setting aside such award (p. 51). August 21, 1917, the widow and the children of the deceased by their guardian *ad litem* filed their libel in the District

Court of the United States for the Southern Division of the Northern District of California, First Division (p. 12). Libelee filed exceptions thereto which were overruled, Judge Rudkin filing a memorandum thereon (p. 22).

March 15, 1918, Antone Garcia, as administrator of the estate of Manuel Souza, deceased, filed his "first amended" libel against the Western Fuel Company and the other libelees named (p. 32). The petitioner filed exceptions to the first amended libel which were overruled by Judge Dooling in ordering a decree for the respondent. Upon rendering his opinion and order for decree in favor of the respondent, the judge of the District Court gave permission to the respondent to amend said amended libel by including the averments that the hatch-tender was negligent and that the accident was also due to such negligence. The case was ordered dismissed as to the libelees Nelson and Weisel and decree in favor of Garcia as administrator in the sum of $9,560 was entered May 13, 1918.

On appeal, the Circuit Court of Appeals affirmed the decree, but held that though a court of admiralty will enforce a right of action for death given by a state statute, it will enforce it in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law (*Western Fuel Company* vs. *Garcia,* 255 Fed. 817) (p. 198).

A re-hearing in the Circuit Court of Appeals was thereafter had upon motion of the petitioner, and after such re-hearing the Court of Appeals vacated the decree affirming the decree of the District Court, reversed the decree of the District Court and ordered the District Court to dismiss the action on the ground that the death was caused by the neg-

ligence of a fellow-servant, but stated that in all other respects the Court was satisfied with the correctness of its former decision (*Western Fuel Company* vs. *Garcia*, 260 Fed. 839) (p. 206). Thereafter the respondent applied for a re-hearing and thereupon the Circuit Court of Appeals, with Circuit Judge Ross dissenting, vacated and set aside its decree reversing the judgment and certified the following questions to this court:

(1) Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?

(2) If the state statutes do apply, are they to be applied with all their incidents abolishing or modifying the common law defenses of assumption of risk, contributory negligence and the negligence of a fellow servant, or

(3) Does the state statute merely give the right of action and leave for application the rules of maritime law covering personal injuries, thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes? (pp. 210-212).

In March, 1920, the petitioner herein petitioned this court for a Writ of *Certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit, and this petition was denied.

On March 18, 1921, the questions certified by the Court of Appeals were argued before this Court, and on March 21, 1921, this Court entered an order granting a Writ of *Certiorari* to the Circuit Court of Appeals and restored the case to the docket for re-argument.

The petitioner contends:

1. That the California statute of limitations bars a recovery and that the District Court erred in not applying the statute. This question was raised by paragraphs 2 and 4 of the Assignment of Errors (pp. 172, 173).

2. That the California statutes abolishing the defenses of assumption of risk and negligence of a fellow servant have no application in admiralty, and that the District Court erred in applying them. This question was raised by paragraphs 22 and 23 of the Assignment of Errors (p. 176).

3. That the death of Souza was caused by the negligence of fellow servants and that therefore there can be no recovery. This question was raised by paragraphs 11 and 19 of the Assignment of Errors (pp. 174, 175).

POINT I.

This action, not having been commenced until more than one year after decedent's death, is barred by the California Statute of Limitations.

In *The Harrisburg*, 119 U. S. 199, it was held that where state statutes give a cause of action for wrongful death and the time within which such an action may be brought is limited by the same statutes admiralty although enforcing the right will also observe the limitation. In that case the steamer belonged to the Port of Philadelphia, and the death occurred in waters within the State of Massachusetts. The Statutes of Pennsylvania gave

a right of action for wrongful death, but limited the time within which the action might be brought to one year after the death. The Statutes of Massachusetts penalized a corporation which caused wrongful death by a fine to be recovered by indictment. The statutes provided that such indictment should be prosecuted within one year after the injury causing the death. The action in the case was not brought within one year, and this court said:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

In that case the liability and the remedy in Pennsylvania were created by the act of the year 1851 and the limitation was created by the act of 1855. The liability and the remedy in this case are found in the same statutes, Section 377 of the Code of Civil Procedure and Section 1970 of the

Civil Code, and the limitation here is found in Section 340 of the Code of Civil Procedure. Therefore it would seem to follow that the limitation in this case is not only of the remedy, but of the right.

In the later case of *Davis* vs. *Mills*, 194 U. S. 451, the plaintiff sued in a state other than Montana to recover upon a right given by a Montana statute, which provided that if a corporation failed to file a specified report, the trustees of the company should be liable for the debts of the company. In the Code of Civil Procedure of Montana, under a title dealing with the time of commencing actions, it was provided by Section 554 as follows:

> "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability created (*Sic*)."

The action was not brought within three years, and the defendants interposed the defense that Section 554 barred the action. In considering that defense, Mr. Justice Holmes in writing for the Court said:

> "The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an obligation which having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* vs. *Mexican*

Natl. R. Co., 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

"If, then, the only question were one of construction and as to liabilities subsequently incurred it would be a comparatively easy matter to say that paragraph 554 of the Montana Code of Civil Procedure qualifies the liability imposed upon directors by paragraph 451 of the Civil Code, and creates a condition to the corresponding right of action against them, which goes with it into any jurisdiction where the action may be brought."

The right of action here is given by Section 377 of the California Code of Civil Procedure and by Section 1970 of the Civil Code. Title 2 of the Code of Civil Procedure is entitled "Time of Commencing

Civil Actions". Chapter 1 of that title, Section 312, provides:

> "Civil actions, without exception, can only be commenced within the periods prescribed by this title, after the cause of action shall have accrued."

Chapter 3 of that title, Section 340, provides:

> "Within one year— * * * 3. An action for libel, slander, assault, battery, false imprisonment, seduction, or other injury to, or for the death of one caused by the wrongful act or neglect of another."

If the limitation contained in Section 554 of the Montana Code of Civil Procedure was directed to the liability created in Section 451 of the Civil Code so specifically as to warrant saying that it qualified the right, then we submit that the limitation contained in Section 340 of the California Code of Civil Procedure in the same way qualifies the right of action given by Section 377 of the same Code and by Section 1970 of the Civil Code.

The respondent alleged the proceedings taken before the Industrial Accident Commission, and that through writ of review at the instance of the petitioner, the award of the Commission was annulled on August 3, 1917. The accident and death of Souza happened on August 5, 1916, and the original libel brought by the heirs of Souza was filed August 31, 1917. The first amended libel brought by the administrator was not filed until the 15th day of March, 1918, three days before the trial of this action. We do not believe that the respondent can be relieved of the bar of the statute

of limitations by Section 355 of the Code of Civil Procedure. That Section reads as follows:

> "If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

This section was construed in the case of *Fay* v. *Costa*, 2 Cal. App. 241, wherein it was held in passing upon this very question of statute of limitations, that an annulling on a writ of review is not a reversal on appeal within the meaning of Section 355. The Court said:

> "The judgment in question here was not 'reversed on appeal', but was annulled and set aside on a writ of review and in order to uphold the action of the trial court we are asked to hold that a reversal on appeal includes an annulling on a writ of review * * * Our code, in the section just cited (C. C. P., Section 1066) uses the word 'appeal' as indicating something different from a writ of review. While to some minds it may be difficult to suggest a reason why the legislature, in the case of a reversal on appeal, should provide that a new action may be brought, and not when the same result is secured by a writ of review, it seems to be so written. * * * We do not think that we are justified in construing the word 'appeal' as used in Section 355 of the Code of Civil Procedure, as including a writ of review. For the reasons above set forth, the demurrer should have been sustained."

Petition for rehearing in that case was denied in the District Court of Appeal on December 21, 1905, and a petition to have the cause heard in the Supreme Court, after judgment in the District

Court of Appeal, was denied by the Supreme Court on January 22, 1906.

If these statutes should be applied in this case they will be given the same construction and effect which are given them by the state courts.

Bauserman v. *Blunt,* 147 U. S. 647;
Andrew v. *Redfield,* 98 U. S. 158.

The respondent plainly bases his excuse for failing to bring the action seasonably upon the proceedings which were improperly taken before the Industrial Accident Commission, but under the decision last quoted it is shown that reliance upon Section 355 is ill-founded.

Just as in the case of *Fay* vs. *Costa,* there was no appeal, but the award in favor of Mrs. Souza was annulled by writ of review, the only remedy available to the Western Fuel Company in the state courts.

In his opinion Judge Dooling on this subject says (Apostles, p. 160):

> "As the beneficiaries here were for a year engaged in the prosecution of their supposed rights under the Workman's Compensation Act, their delay in bringing the present action is accounted for so as to remove the bar of limitations. *Fill* v. *Cunard Co.,* 217 Fed. 84."

If this authority is to be relied upon as establishing the principle that excuse existed for the delay in resorting to the admiralty court by reason of the pendency of the proceedings before the Industrial Accident Commission and the state court, nevertheless there is an entire failure to excuse the commencement of the action by the proper party, viz., the administrator. This was specifically attacked in the exceptions filed to the first amended libel.

Circuit Judge Ross in writing for the Circuit

Court of Appeals in this case stated that since the right of action for death given by the state statute would be enforced by a Court of Admiralty in accordance with the recognized principles of Maritime Law unaffected by the provisions of any state or local law, therefore,

> "The California statute of limitations of one year relied upon by the appellant in bar of the action, has no more application to the case than had the California statute of frauds involved in the case of the *Union Fish Company* vs. *Erickson, supra*, just decided by the Supreme Court."

That case, however, is not at all in point. There Erickson made an oral contract to serve for a year as master of a vessel in Alaska and he sued in Admiralty for wrongful discharge. The libellee set up as a defence the California Statute of Frauds. This Court said:

> "In entering into this contract the parties contemplated no services in California. They were making an arrangement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the principal engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made."

In that case the plaintiff's right of action did not depend upon any state law, as it was a maritime contract, but was given the right of action by Admiralty itself. Here, however, we have a case where the plaintiff's right of action does depend upon the state law and Admiralty would not grant any relief if it were not for the state law.

POINT II.

State statutes fixing the liabilities of parties in tort actions will not be applied in admiralty.

By Article 3, Section 2 of the Constitution of the United States, the judicial power of the United States was extended to all cases of admiralty and maritime jurisdiction, and by Section 8 of Article 1 of the Constitution, Congress was given power to make all laws necessary and proper for carrying out all powers granted by the Constitution to the Federal Government. Pursuant to the power granted to it to make necessary and proper laws, Congress by Section 9 of the Judiciary Act of 1789, gave to the District Courts of the United States "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it".

By Section 34 of the same act, now Revised Statutes Section 721, Congress provided:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in Courts of the United States where they apply."

This section has been construed to mean that whenever any state has enacted any legislation which is not unconstitutional or in conflict with a Federal Statute, that legislation is binding upon the Federal Courts sitting within that state in trials at common law. Congress by specifying trials at com-

mon law as the only ones in which state laws should be the rules of decision just as effectively showed its intention that state laws should not be rules of decision in admiralty as if it had included in the section a specific provision to that effect. Such is the construction to be given the section under the maxim, *expressio unius est exclusio alterius.*

In *Dourousseau* v. *United States,* 6 Cranch 307, 314, in construing the Constitution and Judiciary Act, Chief Justice Marshall said:

> "When the first legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.
>
> The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.
>
> It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers."

In *Ex Parte McCardle,* 7 Wall. 506, the court speaking of the Dourousseau case said: "The principle that the affirmative of appellate jurisdiction implies the negation of all such jurisdiction not affirmed" has been established.

In *Tucker* v. *Alexandroff*, 183 U. S. 424, 436, the court said:

> "Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject-matter is a negation of all other analogous powers with respect to the same subject matter."

See also *In Re Heath*, 144 U. S. 92, 93.

There can be no question of the applicability of that rule of construction to this statute. Congress purposely excluded trials in admiralty from the operation of this statute so that the rights of litigants in courts of admiralty should be uniform and equal and not subject to the varying whims and ideas of the legislators of the different states; so that a claimant's right to relief might not be limited by restrictive laws of any State legislature and so that the respondent might not be deprived of his recognized defenses.

In the same Judiciary Act, in what are now Sections 913 and 914 of the Revised Statutes, Congress expressly provided that not even the practice, forms or proceedings in admiralty should be the same as those in State courts. By these several statutes Congress showed unmistakably that courts of admiralty were to be independent of all state laws and decisions.

The only case of a maritime tort which we have been able to find in which any mention is made of Section 34 of the Judiciary Act is the case of *American Steamboat Co.* v. *Chase*, 83 U. S. 522, 534, in which the court said:

> "Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he

> must conform to the system of pleading and to the rules of practice, and of evidence, which prevail in the chosen forum. State statutes, if applicable to the case, constitute the rules of decision in common law actions, in the circuit courts as well as in the state courts, but the rules of pleading, practice and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decisions of this court. State legislatures may regulate the practice, proceedings and rules of evidence in their own courts, and those rules, under the 34th section of the judiciary act, become, in suits at common law, the rules of decision, where they apply, in the circuit courts."

This might permit an argument that only the rules of pleading, practice and of evidence in the admiralty courts are regulated by the admiralty law and that when the laws of the several states are mentioned in Section 34, only state laws regulating practice, pleading and rules of evidence are meant. However, the section has not been construed so narrowly and we do not believe it necessary to cite more than a few cases to show that state laws affecting the rights and liabilities of the parties are included.

Bucher v. *Cheshire R. R. Co.,* 125 U. S. 555;
Detroit v. *Osborne,* 135 U. S. 499;
McClaine v. *Rankin,* 197 U. S. 154.

Moreover, any such argument is rebutted when consideration is given to the court's statement earlier in the opinion that "the remedy, in the two jurisdictions, is without any substantial difference." It is true that in those days the rules of liability were practically the same except as to the effect which contributory negligence had upon

the right of the claimant to recover. The rule that contributory negligence would not defeat a recovery had always been recognized in admiralty, whereas in actions at common law contributory negligence barred a recovery.

Max Morris, 137 U. S. 1;
Belden v. *Chase,* 150 U. S. 674;
Atlee v. *Northwestern Packet Co.,* 88 U. S. 389.

It was because the great difference in the two jurisdictions at that time lay in the practice, pleadings and rules of evidence that the court made such slight reference to the difference in the remedies. At that time it was difficult to foresee what drastic changes would be made in the common law rules of liability by the various State Legislatures. Such changes have been made in the case of employer and employee that few, if any, of the rules at common law respecting the liabilities of the two parties are at present applicable. If it had been possible to foresee those changes which would result in taking away the substantial defenses of the employer, we refuse to believe that the court would have been satisfied to point out specifically the difference in the pleadings, practice and evidence and pass the question of the difference in the rules of liability in such an offhand manner.

We have been unable to find any case where Section 721 has been construed or any effect given it in an action in Admiralty. This is doubtless due to the fact that there never had been any doubt, particularly prior to the enactment of the death statutes, that in an action in admiralty, admiralty rules of liability should be applied to the exclusion of State laws. Nearly all the recent decisions, if not all, which considered the applicability of State

Statutes to torts arising in navigable waters, were in respect of proceedings in State tribunals and there was no occasion to consider what application they might have had to suits in admiralty.

So far as we can find, this is the first case in this court where the applicability to tort actions in admiralty of State laws fixing liability has been considered.

In the case of *Trauffler* v. *Detroit & Cleveland Navigation Co.*, 181 Fed. 256, Judge Hazel, in an action in Admiralty in the District Court for the Western District of New York, followed the Employers' Liability Act of the State of New York, but it will be noted that no question was raised as to the applicability of the State law, as is apparent from page 261, where he says:

> "Both sides concede that the rights of recovery herein by the libellants in their representative capacity are not enforcible by the old maritime rules where contributory negligence bars recovery (*sic*), and that the law of the State is controlling."

So far from having considered the force of Section 721, there was no need for him to have considered it, in view of the fact that the parties were willing that the case should be adjudged in accordance with the laws of the State of New York.

In *Cornell Steamboat Co.* v. *Fallon,* 179 Fed. 293, the Circuit Court of Appeals for the Second Circuit held that the personal representatives of a decedent were not limited in their recovery to the amount which the decedent might have recovered had he lived. This decision is construed by the District Court in the *Schuede* case as holding that a seaman injured would have had his rights determined by the maritime law, whereas his administrator was

entitled to have them determined by the State law. If that construction can be given the decision in the *Cornell Steamboat Co.* case, then we say that the court failed to consider Section 721.

In *Quinctte* v. *Bisso,* 136 Fed. 825, an action was brought in admiralty to recover damages for death under the Louisiana law. The question of contributory negligence arose, and the court stated:

> "The statute must be applied in admiralty just as if the suit had been brought in the state courts; and any defences which are open to the defendant under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel."

And the court therefore held that the contributory negligence of the deceased would be a good defence, although it was found that the deceased was not guilty of contributory negligence.

The whole discussion of this proposition is contained in one comparatively short paragraph, and the court bases its conclusion upon certain cases in this court which we think do not warrant the conclusion, and without any independent consideration on the court's part. One of the cases cited in support of the conclusion was *The Harrisburg,* which we have already quoted from under Point I. The points decided in that case were that since the liability and the remedy were created by the same statutes, limitations of the remedy were to be treated as limitations of the right; and that in the absence of statute no action could be brought in admiralty for wrongful death. It is too well settled for argument that contributory negligence affects the remedy and not the right.

The Alaska, 130 U. S. 201, another case cited, simply held in accordance with the rule laid down

in *The Harrisburg* that, in the absence of a state or federal statute, an action could not be maintained for wrongful death and the court did not consider the question as to the applicability of state statutes affecting the remedy in case an action had been commenced based upon a state statute.

The court then quotes from *The Corsair,* 145 U. S. 335, to the effect that

> "this local law did not give a lien or privilege upon the vessel, and that nothing more was contemplated by it than an ordinary action according to the course of law as administered in Louisiana."

This quotation was taken from the opinion, evidently without giving consideration to the point involved and to what was actually decided in the case. In that case the right of action was also based upon the Louisiana law granting a cause of action for death. The question which the court was considering at the time was whether it was proper for the libellant to proceed *in rem,* and the court followed the rule that where it is necessary to look to the local law for the right to take cognizance of a particular cause, it is necessary to inquire whether the local law gives a lien upon the offending thing, because unless a lien in such a case be given by the local law, a proceeding *in rem* may not be started in a court of admiralty. With that proposition laid down, the court proceeded to state what the Louisiana act declared, and said:

> "Evidently nothing more is here contemplated than an ordinary action according to the course of the law as it is administered in Louisiana."

The first part of the quotation in the *Quinette* case is not connected in any respect with what has just been quoted above. Immediately after the quotation above, the court went on to say:

> "There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed *in rem*."

Since the only question was whether the proceeding *in rem* was given by the Louisiana law, it is evident that when the court spoke of "An ordinary action according to the course of the law as it is administered in Louisiana", the court simply meant an action *in personam*. There is no warrant, therefore, in anything laid down in *The Corsair* for the conclusion that this court believed that a court of admiralty would be bound by any state law which might be on the statute books simply because the court of admiralty would enforce a right of action for death given by the state statute.

Neither in that case was consideration given to Section 34 of the Judiciary Act.

The statutes of the State of California under consideration here take away from an employer in an action brought by an employee for injuries, or by an employee's personal representatives where death has resulted, the defenses theretofore had by employers, viz., assumption of risk, negligence of a fellow servant and contributory negligence. These statutes are not mere rules of evidence. They affect the rights and liabilities of the parties. This court so held when it had before it the "Prima Facie Act" of Mississippi, which provided that in an action against a railroad for damages, proof of injury inflicted by an engine propelled by steam should be *prima facie* evidence of negligence. (*New*

Orleans & N. E. R. Co. vs. *Harris,* 247 U. S. 367; *Yazoo & Miss. Valley R. Co.* vs. *Mullins,* 249 U. S. 531.)

If a State Legislature in actions by employees against employers brought in a Court of Admiralty, may take away the employer's defenses, then it can go one step further and make the employer responsible for all injuries regardless of negligence. We would then have a compensation law, and a compensation law applicable not only in State Courts but in Courts of Admiralty as well. This would be going far beyond what was contended for in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205. At the time of that decision no one had the temerity to suggest that a state could force a compensation act upon a court sitting in admiralty.

The so-called Roseberry Act was enacted in 1911 and evidently was the forerunner of the Workmens' Compensation Insurance & Safety Act of California which was enacted in 1913. As a matter of fact this Roseberry Act accomplished practically the same result as is accomplished by one at least of the so-called elective compensation laws. In New Jersey, for instance, an employer may elect not to bring himself within the second part of the compensation law, but in such event the employee can sue for damages under Part One of the law and the employer is stripped of his common law defenses. The employee need only prove negligence and that is all that is necessary for the employee to prove under the Roseberry Act. If the New Jersey compensation law is not applicable to maritime torts, and there is no question but that it is not applicable (*Coon* v. *Kennedy,* 248 U. S. 457, 91 N. J. L. 598), how can it seriously be contended that the Roseberry Act, which is in effect a compensation law, is enforceable in a court of admiralty.

If it were enforceable we would then see a court of admiralty, especially set up by Congress under the authority granted it by the Constitution so that litigants in maritime cases might have a tribunal to which they might go and be assured of uniform justice, informing a litigant that because the tort out of which his claim arose happened in San Francisco, California, instead of Seattle, Washington, he had been stripped of his defenses. The stevedore in Seattle would be told that he could not recover because the hatch-tender was a fellow servant, although his brother stevedore in San Francisco would be enabled to recover although the hatch-tender who caused his injury was his fellow servant.

This Court has held in numerous cases in which actions were brought under the Federal Employers' Liability Act that state statutes would have no application, although the suits were brought in state courts, because Congress had legislated (*New York C. R. R. Co.* vs. *Winfield*, 244 U. S. 147, and cases therein cited). Prior to the enactment of that act the legislatures of the several states had the right to enact laws affecting interstate carriers. Congress by its enactment of the Federal Employers' Liability Act took away from the states the rights which theretofore they had been permitted to exercise. On the other hand, over maritime matters the states had never exercised any jurisdiction, because jurisdiction had been from the beginning reserved to Congress. The distinction was recognized in *Knickerbocker Ice Co.* vs. *Stewart*, 253 U. S. 149, where it was said:

> "The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten * * *

> Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts could not create substantive rights or obligations, or indicate assent to their creation by the states."

And even though Congress, in enacting Section 34 of the Judiciary Act, had not shown conclusively that state statutes could not affect proceedings in admiralty, still its failure to legislate could not be construed as permission for the states to make their legislation binding in admiralty. This Court has held in *Knickerbocker Ice Co.* vs. *Stewart, supra,* that Congress alone has the right to legislate in maritime matters, and that it could not permit state legislatures by legislation to repeal, amend or change the characteristic features of maritime law. This Court had under consideration in that case the amendment of Clause 3 of Section 24 of the Judicial Code, which added the saving clause: "and to claimants the rights and remedies under the Workmen's Compensation Law of any State." If Congress could not delegate its power to the several states and permit them to enact laws applicable to maritime injuries for which a remedy was sought in state tribunals, certainly it cannot be said that the states without permission from Congress can enact laws applicable, not only in their own courts, but in the admiralty courts as well.

All the late cases, with the exception of *Union Fish Co.* vs. *Erickson,* 248 U. S. 308, considered the applicability of state laws to proceedings in state tribunals or to actions at common law.

Southern Pacific Co. vs. *Jensen,* 244 U. S. 205.

Knickerbocker Ice. Co. vs. *Stewart,* 253 U. S. 149.

Chelentis vs. *Luckenbach*, 247 U. S. 372.
Schuede vs. *Zenith S. S. Co.*, 244 U. S. 646.

In the *Southern Pacific* case the court had under consideration the applicability of the New York Workmen's Compensation Act to maritime injuries. Mr. Justice McReynolds said:

> "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country * * * And further, that in the absence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."

Concerning the extent to which the general maritime law may be changed, modified, or affected by state legislation, this was said:

> "No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*."

Among such quotations is the following:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of

> laws coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

After that decision Congress amended the Judicial Code by adding to the saving clause in Section 34 the words "and to claimants the rights and remedies under the Workmens Compensation Law of any state". After that amendment the New York Compensation Law again came before the Court in the *Knickerbocker Ice* case. In writing for the Court, Mr. Justice McReynolds said:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite

end Congress was empowered to legislate within that sphere.

"Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago * * *

"The Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true, it is quite impossible to account for a multitude of adjudications by the admiralty courts * * *

"Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In the *Chelentis* case petitioner while employed on board respondent's steamship was injured and commenced an action at common law in the New York courts to recover for his injuries which action was removed into the District Court for the proper district. Petitioner sought to have applied the common law rule of indemnity. This Court said:

"The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime; and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59, 60. And unless in some way there was imposed

upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance, and cure. Under the doctrine approved in *Southern P. Co.* v. *Jensen*, no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. * * *

"Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing there in which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

In *Schuede* vs. *Zenith Steamship Co.*, 244 U. S. 646; 216 Fed. 566, plaintiff commenced an action at law in the State Court of Ohio, which was removed to the District Court because of diversity of citizenship. The plaintiff sought to take advantage of the provisions of the Ohio Employers' Liability Act, and it was held by the District Court that that act was not applicable to a maritime contract of employment. On writ of *certiorari* to the Circuit Court of Appeals, this Court affirmed the judgment of the District Court by an equally divided court, Mr. Justice Day not taking part. Mr. Justice Pit-

ney, in his dissenting opinion in the *Southern Pacific Co.* case, refers to this *Schuede* case and states that the reasoning of the District Court is unsatisfactory. This was prior to the determination of the *Schuede* case in the Supreme Court. As we have stated, the action in the *Schuede* case was at law and not in admiralty, and the District Court Judge decided that since the action was commenced in a state court and removed only because of diversity of citizenship, the law applicable in the District Court would be the same as that applicable in a state court. The conclusion arrived at, therefore, in that case was that even in an action brought in a state court on account of a maritime tort, the rights of the parties were to be determined by the recognized rules of maritime law, and that state statutes could neither add to nor take away from those rights. It having been adjudicated that a state statute can have no application in an action brought in a state court for a maritime injury, there can be no doubt that a state statute could have no application in an action brought in a court of admiralty.

If this action had been instituted in the state courts of California instead of in an admiralty court of the United States, the case would be more analagous, and would be on all fours with the *Schuede* case. The question presented then would be whether the State Legislature could enact any legislation affecting maritime rights regardless of the jurisdiction in which remedy was sought. The holding of a majority of this Court in the cited cases would warrant the conclusion that even in such a case, the Roseberry Act would not be applicable. However, it is not necessary for us to go as far as that in our contention.

Here is a suit instituted in a court of admiralty

in which it is sought to make the liabilities of the parties dependent upon local laws, and as the late Chief Justice said in *Workman* vs. *New York City,* 179 U. S. 552:

> "The issue is not as was the case in *Detroit* vs. *Osborne* (1890), 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Article III, Section 2) upon the courts of the United States."

It is true that the local law there spoken of was not a state statute, but the decisions of the New York Court of Appeals holding that a city could not be sued for negligence causing injuries when engaged in a governmental function. Whether the local law be statutory or the decision of a state court is immaterial. The fundamental objection to its application is that the principles of the general maritime law might be overthrown. Just as the decisions of the several state courts might be conflicting, so might the enactments of the several state legislatures be conflicting. The court showed that there could be no difference in the result, whether it be a state law or a state decision when it said:

> "As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing tomorrow."

It has always been recognized that there is a very material difference in the liabilities of the parties to a suit according as it was one at common law or in admiralty, and that whereas such liabilities at common law might change with the several states, they would remain the same in admiralty. Even the dissenting members of this court in the recent cases recognized the rule. Although the exhaustive opinions of Mr. Justice Holmes and Mr. Justice Pitney in *Southern Pacific Co.* v. *Jensen*, were directed toward the argument that the states had the power to enact laws which would be of effect in actions and proceedings in state tribunals arising out of maritime injuries, there may be sufficient taken from them to show that it is the unanimous opinion of this court that an admiralty court cannot and will not be bound by common law or statutory rules of liability.

Mr. Justice Holmes said:

> "This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common law or admiralty court. Compare *The Max Morris*, 137 U. S. 1, with *Belden* vs. *Chase*, 150 U. S. 674, 691. But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman* v. *New York*, 179 U. S. 552, the state law, common or statute, would prevail in the courts of the state. Happily such conflicts are few."

Mr. Justice Pitney stated this to be one of his conclusions from a study of the Constitution, Judiciary Act and decisions:

> "* * * (3) that by the law of England, and by the practice of the colonial governments, the courts of common law, of equity,

> and of admiralty were controlled in their decisions by separate, and, in a sense, independent systems of substantive law, and the constitutional grant of judicial power in 'all cases in law and equity', and in 'all cases of admiralty and maritime jurisdiction', was no more intended (in the absence of legislation by Congress) to make the rules of maritime law binding upon the Federal courts of common law when exercising their concurrent jurisdiction, than to make the rules of the common law binding upon the courts of admiralty."

The question before the court in this case is answered in this succinct statement by Mr. Justice Pitney in the same case:

> "In this language there is the clearest recognition that the Constitution, in establishing and distributing the judicial power, did not intend to define substantive law, or to make the rules of decision in one jurisdiction binding *proprio vigore* in tribunals exercising another jurisdiction. The courts of common law were to administer justice according to the common law, the courts of equity according to the principles of equity, and the courts of admiralty and maritime jurisdiction according to the maritime law. The expression on page 575 (of the *Lottawanna* case) respecting the uniform operation of the maritime law was predicated only of the operation of that law as administered in the courts of admiralty, for it is not to be believed that there was any purpose to overrule *Atlee* v. *Northwestern Union Packet Co.*, 21 Wall. 389, 395, decided at the same term and only about two months before *The Lottawanna* by a unanimous court, including Mr. Justice Bradley himself, in which it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty, each court was at liberty to adopt its own rules of decision."

In the *Workman* case it was said, at page 558:

> "The practical destruction of a uniform maritime law, which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would necessarily be one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted, or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. * * *"

And at page 563:

> "* * * The local decisions of one or more states cannot, as a matter of authority, abrogate the maritime law. * * *"

In *Steamboat New York* vs. *Rae*, 59 U. S. 223, there was a collision between two vessels. The point was made by the steamboat that the brig in collision with it was at fault in not showing a light. The evidence showed that a light was shown but the steamboat claimed that although the brig had a light sufficient within the requirements of the admiralty rule still she was at fault in not show-

ing a light in conformity with the statutes of New York. In disposing of this question this court said:

> "This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her own courts, but cannot regulate the decisions of the Federal Courts, administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized in maritime countries, modified by Acts of Congress independently of local legislation."

In *Atlee* vs. *N. W. Union Packet Co.*, 21 Wall. 389, it was said:

> "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages.
>
> "In the common law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice, as the other; and the plaintiff who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum.

> "It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially."

In *The Eagle* vs. *Fraser,* 8 Wall. 15, there was a collision on the Canadian side of the line through the Detroit River between Canada and the United States and the point was made that the law of the place where the tort was committed should apply, and that there was no law in force in Canada giving a lien for damages. In support of the contention reliance was had on the case of *Smith* vs. *Conary,* 1 Howard, 28, where it was held in the case of a collision in the port of Liverpool that, in view of the fact that the laws of England oblige the ship to take on a pilot, this excused the owner of the vessel for the negligence of the pilot. In passing upon this contention the court said:

> "These are exceptional cases and furnish no rule to the court below for the trial of the collisions in question. It was tried, therefore, as it should have been tried, according to the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law."

In *Watts* vs. *Camors,* 115 U. S. 353, it was said:

> "But the law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties, or as a question of judicial remedy.
>
> "If it is considered as depending upon the intent of the parties as manifested by their written contract, the performance of that con-

tract is to be regulated by the law which they must be presumed to have had in view when they executed it. *Wayman* v. *Southard*, 10 Wheat. 1, 48; *Pritchard* v. *Norton*, 106 U. S. 124. Americans and Englishmen entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the State in which the contract is signed.

"If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several States."

In *Butler* vs. *Boston, etc., S. S. Co.*, 130 U. S. 527, it was said:

"It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the State technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea."

The Lottawanna, 21 Wall. 558;
The Max Morris, 137 U. S. 1;
Belden v. *Chase*, 150 U. S. 674;
The Genesee Chief, 12 How. 443;
Leon v. *Galceran*, 11 Wall. 185;
Liverpool & Great Western Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397;
La Bourgogne, 210 U. S. 95.

It is argued that this case is unlike the *Schuede* case because this is an action for death whereas the *Schuede* case was one for personal injuries and that the opinion in the *Schuede* case impliedly conceded that the ruling might have been different if the action had been for death. Whether the action be one to recover for personal injuries or to recover for death cannot affect the determination. Although it is true that in admiralty the personal representatives of the deceased must rely upon the state statute for their right to commence an action, still the state statutes do not add anything to the jurisdiction of the admiralty courts. An admiralty court has full and complete jurisdiction over maritime wrongs and injuries of every kind and description. The only question is as to whether an admiralty court will grant any relief.

In *Ex Parte Gordon*, 104 U. S. 515, an action was brought in the District Court of Maryland for damages for the drowning of certain persons in consequence of a collision. The owners of one of the steamers in collision sought a writ of prohibition to restrain the District Court from proceeding with the cause, the claim being that since there was no action for death known to admiralty, the District Court was without jurisdiction to proceed. This court said:

> "The Court of Admiralty has jurisdiction of the vessel, and the subject-matter of the action, to-wit, the collision. It is competent to try the facts, and, as we think, to determine whether, since the common law courts in England and to a large extent in the United States, are permitted to estimate damages which a particular person has sustained by the wrongful killing of another, the courts of admiralty may not do the same thing. * * * Under these circumstances, it seems to us clear that the admiralty courts are competent to determine all the questions involved."

A court of admiralty will recognize state statutes permitting a recovery for death, but will enforce them in accordance with the well recognized principles of maritime law. If it were otherwise an unfortunate state of affairs would follow. This might be a result: A person suing for personal injuries in an admiralty court would be defeated because of assumption of risk or that his injury was caused by a fellow servant. At the same time that he received his personal injury a man working immediately next to him was killed by the same accident. The personal representatives of the deceased might commence an action at the same time in the same court of admiralty, and they would be permitted to recover because it would not be open to the employer to say that the deceased assumed the risk or that his death was caused by the negligence of a fellow servant. That would certainly be lack of uniformity.

And this contention is made with full knowledge of the fact that a state statute permits a recovery in a death action only in cases where the deceased, if he had lived, himself might have recovered for his injuries. The proof required to recover under state statutes is the same whether the action be for personal injuries or for death. The defenses which can be interposed are the same whether the action be for personal injuries or for death. The only difference in the two actions is one of procedure, and that only in some states. It is a rule of the common law of the states that an employee in order to recover must show himself to be free from contributory negligence. In an action for death some states provide that because the deceased is not present and therefore has no opportunity of showing his freedom from contributory negligence, the burden is upon the employer of proving

contributory negligence. Such statutes have been held, however, merely to be rules of procedure and not affecting the substantial rights of the parties. (*Sackheim* v. *Pigueron*, 215 N. Y. 62.) We doubt that any state could enact legislation which could permit a recovery in death cases where there was assumption of risk, negligence of a fellow servant or contributory negligence, and at the same time refuse a right to recover in personal injury actions because of assumption of risk, negligence of a fellow servant or contributory negligence. Such legislation would be highly discriminatory and contrary to the Constitution. The contention that in a Court of Admiralty different rules of liability should be applied in actions for personal injury and in actions for death is unreasonable.

From the beginning it has always been recognized that there was a difference in the rules of liability applicable in courts of common law and courts of admiralty. Under the Judiciary Act a person injured by reason of a maritime tort has the election of proceeding in admiralty or proceeding at common law. As Mr. Justice Pitney says in the *Jensen* case, that saving clause was solely for the benefit of claimants. It is open to a claimant before starting an action to determine in which jurisdiction he would prefer to sue. If he proceeds in a court of common law he acquires the benefits and assumes the obligations of the common law. If he proceeds in admiralty, he acquires the benefits and assumes the obligations of admiralty. It was open to the plaintiff in this case to proceed in the State Courts of California and there avail himself of the California Statutes. However, he preferred to commence this action in a court of admiralty, and it would be absurd to say that, having had the choice of jurisdiction, he could elect to bring his

action in one jurisdiction and refuse to be bound by the obligations imposed in that jurisdiction, although wishing to avail himself of the benefits. And that, too, where the law he wishes to avail himself of is in conflict with the law of the forum.

It is no answer to say that the plaintiff did have the right to come into a Court of Admiralty. That right is conceded. But a man with an election of jurisdictions cannot proceed in one and insist upon having the rules of another jurisdiction applied.

The State of California has certain jurisdiction over the waters within its boundaries. The United States has paramount jurisdiction over the waters throughout the country, whether within or without the boundaries of any State. Whatever jurisdiction the State courts of California have over torts committed on navigable waters within the State of California, they have solely because of the saving clause in the Judiciary Act. Even though we assume what has been denied that the State of California may enact any legislation it sees fit which is applicable in the Courts of the State of California to actions for maritime tort, it certainly cannot be said that it has the right to legislate and make that legislation binding upon the paramount authority, the Federal Government and the District Courts to whom jurisdiction was given by the Federal Government.

The argument that because in this case admiralty is enforcing a right given by a state statute the liabilities of the parties are fixed by the state statutes, is satisfactorily answered by the decision in *The J. E. Rumbell,* 148 U. S. 1, holding that because admiralty would enforce a lien given by a state statute was no reason for saying that the state laws should determine how it should be enforced. The question presented was whether a claim arising upon

a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the State of Illinois subsequently to the date of the recording of the mortgage. The State law had created a lien for repairs or supplies furnished to a vessel in her home port and the courts of the United States held in Illinois, as well as the Supreme Court of that State had held that a mortgage took precedence of such a lien for supplies afterwards furnished to a vessel in her home port. In refusing to follow such decisions, this court said:

> "But the question in controversy depends upon principles of general jurisprudence and upon the true construction of an Act of Congress, and arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution. Upon such a question, neither the decisions of the highest court of a State, nor those of the circuit and district courts of the United States, can relieve this court from the duty of exercising its own judgment. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 443; *Andrews* v. *Hovey,* 124 U. S. 694, 717. * * *
>
> "It would seem to follow that any priority given by the statute of a state, or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law. As was forcibly said by Mr. Justice Matthews, in *The Guiding Star,* above cited, 'In enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or of equity, when they apply it. Everything required by the statute, as a condition on which the lien arises

and vests, must, of course, be regarded by courts of admiralty; for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles' 18 Fed. Rep. 268."

POINT III.

Since Souza met his death by reason of the negligence of a fellow servant, no recovery can be had.

The trial court found:

> "6. The death of Souza was due to the negligence of Hayes in withdrawing the bucket from the hopper before it was fully dumped, and to the negligence of the hatch-tender in not giving warning to those in the hold" (p. 161).

The Circuit Court of Appeals approved this finding (p. 198).

The trial court, holding that the California Statutes taking away the defense of negligence of a fellow servant were applicable, granted a recovery (p. 160). The Circuit Court of Appeals, however, held that the state statutes were not applicable, and that as the negligence was that of fellow servants there could be no recovery (p. 206).

If our contention embodied in Point II is correct, that is that these state statutes have no application,

then there can be no recovery in this case, because Hayes and Costa were fellow servants of Souza. They were engaged in the same common employment; they were actually engaged in the same operation, unloading this steamboat. Hayes, Costa and Souza were working in the same gang; each had a different duty to perform, but the common end in view was the unloading of the boat. Even though it could be found that they were engaged in different departments, there could be no recovery because this case would not be within the rule laid down in *Northern Pacific Railroad Company* vs. *Hambly*, 154 U. S. 349, where it was said:

> "This is probably the most satisfactory test of liability. If the departments of the two servants are so separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow-servant should not apply."

Here it is conceded that the men in the hold were cognizant of the fact that coal dropped from the bucket and the hopper, and it must be conceded that they knew if the engineer or the hatch-tender was negligent they might be injured. The hatch-tender stood in an intermediate position between Souza and Hayes and the dump-man. The fact that he may have received higher wages does not make him any the less a fellow servant. Under the decisions of this court there can be no doubt that they were all fellow-servants.

Quebec S. S. Co. vs. *Merchant*, 133 U. S. 375;

Alaska, etc., Gold Mining Co. vs. *Whelan*, 168 U. S. 86;

Northern Pacific R. R. Co. vs. *Charless*, 162 U. S. 359;
Baltimore & Ohio R. R. Co. vs. *Baugh*, 149 U. S. 368;
Railroad Company vs. *Conroy*, 175 U. S. 323.

The decisions of the lower courts are in agreement.

The Hoquiam, 253 Fed. 627;
Olson vs. *Oregon Coal & Navigation Co.*, 104 Fed. 574;
Grumsley vs. *Hawkins*, 46 Fed. 402;
The Bolivia, 59 Fed. 628;
Hermann vs. *Port Blakley Mill Co.*, 71 Fed. 859;
The Anaces, 87 Fed. 569;
City of Norwalk, 55 Fed. 102;
The Troop, 128 Fed. 858;
The West-Port, 136 Fed. 391;
The C. S. Holmes, 220 Fed. 273;
The Rosalie Mahony, 218 Fed. 695.

Conclusion.

The decree of the District Court should be reversed and the libel should be dismissed.

Respectfully submitted,

JOSEPH F. MURRAY,
Counsel for Petitioner.

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Supreme Court of the United States,

OCTOBER TERM— [redacted] 1920

WESTERN FUEL COMPANY, a Corporation,
Appellant,
AGAINST
ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, deceased,
Appellee.

No. 229 [redacted]

BRIEF FOR WESTERN FUEL COMPANY.

Statement.

This case is here upon certificate from the United States Circuit Court of Appeals for the Ninth Circuit. The latter court certifies to this court the following questions concerning which it desires instructions:

> "1. Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?
>
> 2. If the state statutes do apply, are they to be applied with all their incidents abolishing

or modifying the common-law defenses of assumption of risk, contributory negligence and the negligence of a fellow servant, or

3. Does the state statute merely give the right of action and leave for application the rules of maritime law covering personal injuries, thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes?"

Appellee's intestate, Manuel Souza, was killed on August 5, 1916, while in the employment of the appellant and working in the hold of the Steamship *Tancred,* which was unloading at Oakland, California. On August 24, 1916, the widow of Manuel Souza made application for the payment of compensation to her by the appellant under the terms of the Workmen's Compensation Insurance & Safety Act of California (Chapter 176, Laws of 1913). An award was made in her favor by the State Industrial Accident Commission and on August 6, 1917, the Supreme Court of California annulled the award on the ground that the State Industrial Accident Commission had no jurisdiction in view of the decision of this court in the case of *Southern Pacific Company* vs. *Marie Jensen,* 244 U. S. 207. Thereafter and on August 21, 1917, this action was initiated by the filing of a libel for damages for wrongful death in the District Court of the United States for the Northern District of California, Southern Division. The appellee was awarded judgment for the sum of Ten Thousand ($10,000) Dollars, from which appellant appealed to the Circuit Court of Appeals. The appellee's cause of action was based upon the Statutes of the State of California, giving a right of action for wrongful death (Section 377,

Code of Civil Procedure; Section 1970 of Civil Code of California).

Code of Civil Procedure, Section 377, is as follows:

> "Section 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

This section so far as actions by employees was concerned was amended by Civil Code Section 1970, reading as follows:

> "Section 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; provided nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or de-

fault of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive-engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine-shop, or other industrial establishment.

"Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.

"When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order or precedence as herein stated, but no more than one action shall be brought for such recovery.

"Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

"The rules and principles of law as to con-

tributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

In 1911 the California legislature passed the so-called Roseberry Act (Stats. 1911, p. 796), which provides in part:

"Section 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.

"Section 2. No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this act."

The pertinent sections of the Statute of Limitations of the State of California are in the Code of Civil Procedure.

C. C. P., Section 340, Subdivision 3, is as follows:

> "Within One Year:
>
> "3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check."

C. C. P., Section 355, is as follows:

> "If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

The District Court in rendering its decree applied the provisions of the statutes above quoted, except the statute of limitations, particularly the Roseberry Act which abolishes the doctrine of assumption of risk and the defence of an accident which was caused by the negligence of a fellow servant.

On appeal the Circuit Court of Appeals affirmed the judgment, but held that although a court of admiralty will enforce a right of action for the death of a deceased given by a state statute, it will enforce it in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law. (*Western Fuel Company* vs. *Garcia*, 255 Fed. 817.)

A rehearing in the Circuit Court of Appeals was thereafter had upon motion of the appellant and after rehearing the Court of Appeals reversed the

judgment on the ground that the death was caused by the negligence of a fellow servant, but stated that in all other respects the court was satisfied with the correctness of its former decision (*Western Fuel Company* vs. *Garcia*, 260 Fed. 839). Thereafter the appellee petitioned for a rehearing and thereupon the Circuit Court of Appeals, Circuit Judge Ross dissenting, certified the questions presented herein.

POINT I.

The statutes of the State of California conferring a right of action for wrongful death are to be applied in libels in admiralty for wrongful death.

In admiralty no cause of action exists to recover damages for death through negligence. This was settled by this court in *The Harrisburg*, 119 U. S. 199, where it was said:

> "Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern the courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

The admiralty courts, however, will enforce a right of action for wrongful death which may be given by a state statute where the tort occurs on navigable waters.

The Harrisburg (supra).
La Bourgogne, 210 U. S. 95, 138.
The Hamilton, 207 U. S. 398.

This is no departure from the general rule that state laws can neither extend nor restrict the jurisdiction of the admiralty courts, for such a statute merely creates a right which is separate from the remedy to be enforced in the proper tribunal.

It is likewise well settled, however, that where a state statute gives a right of action for wrongful death and the time within which such an action may be brought is limited, admiralty although enforcing the right will also observe the limitation.

In *The Harrisburg* (*supra*) the steamer belonged to the Port of Philadelphia and the death occurred in waters within the State of Massachusetts. The Statutes of Pennsylvania gave a right of action for wrongful death but limited the time within which the action might be brought to one year after the death. The Statutes of Massachusetts penalized a corporation which caused wrongful death by a fine to be recovered by indictment. The Statutes provided that such indictments should be prosecuted within one year after the injury causing the death. The action in the case was not brought within one year, and this court said:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and

not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

This court said in *Davis* vs. *Mills*, 194 U. S., 451, 454:

"The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an *obligatio*, which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* v. *Mexican National Railroad*, 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori*, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like

other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

In *Atlantic Coast Line Railroad* vs. *Burnett,* 239 U. S. 199, 201, it is said:

"When a law that is relied on as a source of an obligation in tort, sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. *Davis* vs. *Mills,* 194 U. S. 451-454; *The Harrisburg,* 119 U. S. 199."

"A suit in admiralty to recover damages for death, brought by virtue of a state statute, is governed by the provisions of the statute on which the right of action rests; *e. g.,* the provisions of the statute regulating the time within which such suit must be brought."

Benedict's Admiralty, 4th Ed., Sec. 240, citing:

Stern v. *La Comp. Gen. Trans.,* 110 Fed. 996;

The A. W. Thompson, 39 Fed. 115, and other cases.

"While courts of admiralty are not bound by local statutes, in determining the question of

laches they govern themselves by the analogies of the common law or statutory limitations, in the absence of special or exceptional circumstances."

I Corpus Juris, 1329, Note 30.

"The policy of statutes of limitation as statutes of repose must be respected in courts of admiralty as much as in courts of common law. In the careful brief furnished by the libelant no case is cited where any suit has been sustained after the lapse of the statutory period."

Nesbit v. *The Amboy*, 36 Fed. 925;
The Southwark, 128 Fed. 149.

"Where a state statute creating a lien or right of action limits the time within which a proceeding thereon may be begun admiralty will observe the limitation."

The Edith, 94 Fed. 518;
The James G. Swan, 106 Fed. 94;
The Catherine Whiting, 99 Fed. 445;
The H. N. Emilie, 70 Fed. 511.

"Where a cause of action rests wholly on a state statute which requires suits founded thereon to be commenced within a limited time, the proviso as to time attaches to the right of action itself and runs with the statute into the admiralty courts."

Stern v. *La Comp. Gen. Trans.*, 110 Fed. 996.

Circuit Judge Ross, writing for the lower court, states that a court of admiralty would enforce a right of action for death given by a state statute unaffected by the provisions of any state or local laws, and went on to say:

"For this reason the California Statute of Limitations of one year, relied upon by the appellant in-

volved in the action, has no more application to the case than had the California Statute of Frauds involved in the case of *Union Fish Company* vs. *Erickson, supra,* just decided by the Supreme Court."

Western Fuel Company v. *Garcia,* 255 Fed. 817.

The *Erickson* case, however, is quite dissimilar. In that case the plaintiff's cause of action did not depend upon any state law. He was given the right of action by admiralty itself because he was suing upon a maritime contract. This court, therefore, properly held that he could not be limited by any state law as to the time within which he might bring an action on the contract.

The first question should be answered in the affirmative.

POINT II.

The state statute merely gives the right of action and leaves for application the rules of maritime law covering personal injuries.

A court of admiralty enforces a right of action in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law. The state statutes are to be resorted to only to ascertain whether a right of action is conferred.

In the *Steamboat New York* vs. *Rea,* 59 U. S. 223, there was a collision between two vessels. The point was made by the steamboat that the brig in collision with it was at fault in not showing a light. The evidence showed that a light was shown but the steamboat claimed that although the brig had a

light sufficient within the requirements of the admiralty rule still she was at fault in not showing a light in conformity with the statutes of New York. In disposing of this question this court said:

> "This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her own courts, but cannot regulate the decisions of the Federal Courts, administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized in maritime countries, modified by Acts of Congress independently of local legislation".

This court in the case of *Atlee* vs. *Packet Company*, 88 U. S. 389, 395, very aptly said:

> "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages.
>
> "In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff who has the selection of the forum in which he will

litigate, cannot complain of the rule of that forum.

"It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially."

To the same effect is

Steamboat Company vs. *Chase*, 83 U. S. 532.

Ex Parte Gordon, 104 U. S. 515.

In *La Bourgogne*, 210 U. S. 95, 140, in considering the question of the right to recover for a loss by death, this court said:

"The proposition then is this, that the right of action (for death) allowed by the French law may not, for the purposes of the limitation of liability, be allowed by the courts of the United States, unless such courts abdicate their functions by declining to draw their own inferences from the proof as to negligence, and, to the contrary, make such inferences as they assume would be drawn by a French court if the proof was before such court. The duty to enforce a cause of action given by the French law does not carry with it the obligation to disregard the proof by declining to give it that effect to which it is entitled under the laws as administered in the courts of the United States."

And as Mr. Justice, now Chief Justice White, said in the case of *Workman* vs. *New York City*, 179 U. S. 552:

"We come then to consider first, whether, in the decision of a controversy, the local law of

the City of New York or the maritime law should control. * * *

"In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit* vs. *Osborne* (1890), 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Article III, Section 2) upon the courts of the United States.

"* * * The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent."

And in speaking of the decision in *The Max Morris,* 137 U. S. 1, 14, the court said:

> "It was held that as by the general principles of the maritime law a measure of relief would be afforded to a person who had suffered a wrong, it was the duty of the admiralty courts to grant relief in accordance with the principles of the maritime law."

Time after time this court has applied the same rules, and in the very recent case of *Knickerbocker Ice Company* vs. *Stewart,* 253 U. S. 149, 160, 166, this court said:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> "Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so

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administered, were distinctly pointed out long ago.

"* * * Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, this court said:

"Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country * * * And further, that in the absence of some controlling statute the general maritime law as accepted by the Federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."

Concerning extent to which the general maritime law may be changed, modified, or affected by state legislation, this was said:

"No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna.*"

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Among such quotations is the following:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

The law is now well settled and a long list of decisions may be cited in support thereof. A few follow:

The Lottawanna, 21 Wall. 558; 22 L. Ed. 654;
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372;
Union Fish Co. v. *Erickson*, 248 U. S. 308;
The City of Alexandria, 17 Fed. 390;
The City of Norwalk, 55 Fed. 98; affirmed 61 Fed. 364;
Schuede v. *Zenith S. S. Co.*, 216 Fed. 566;
Tropical Fruit S. S. Co. v. *Towle*, 222 Fed. 867.

In a number of decisions the lower courts have so expressly stated that the maritime law will be administered without regard to the rules of law enacted by state legislatures that it may be well to call attention to the specific language employed.

In *Welch* v. *North Cambria*, 40 Fed. 655, the court said:

> "* * * The states have no power to interfere with the admiralty system of laws."

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In *The Chusan,* Fed. Cas. 2717, the court said:

> "In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer."

In *Mack S. S. Co.* v. *Thompson,* 176 Fed. 499, the court said (p. 504):

> "We think the maritime law subsists as an entirety as the subject of federal jurisprudence, and is to administered by the federal courts without impairment by state legislation. If changes are to be made in it, it must be done by federal authority."

In *The H. B. Hyde,* 195 Fed. 312, it was said:

> "The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. The right of action arising out of a maritime tort, relating to the recovery of damages for personal injuries, depends upon the maritime law, which has been adopted by the laws and usages of the country."

The foregoing decision was expressly approved by the court in

Swayne & Hoyt v. *Barsch,* 226 Fed. 581,

the court saying that the rule there announced "is well settled".

There is no distinction in principle, nor we believe to be found in precedent, in the application in admiralty of the doctrine of the defense of negligence of fellow servant, between actions for per-

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sonal injuries not resulting in death and actions for wrongful death.

If such a distinction is now to be drawn, will the proper harmony and uniformity and the characteristic features of the general maritime law be maintained? Will not the different modifications made by the various state statutes in their incidents relating to various defenses inevitably destroy such harmony and uniformity?

The second question should be answered in the negative and the third question in the affirmative.

Conclusion.

The first and third questions should be answered in the affirmative and the second question in the negative.

Respectfully submitted,

JOSEPH F. MURRAY,
ROBERT M. MCCORMICK,
Counsel for Western Fuel Company.

Office Supreme Court, U. S.
MAR 2 1920
JAMES D. MAHER,
CLERK.

No. [redacted]

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

THE WESTERN FUEL COMPANY.
(a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

PETITION TO THE SUPREME COURT OF THE UNITED STATES, UNDER THE ACT OF CONGRESS OF MARCH 3, 1891,

For Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit.

BRIEF IN SUPPORT THEREOF
and
NOTICE OF MOTION.

FISCHER & FISCHER,
HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Petitioner.

No. 689

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

THE WESTERN FUEL COMPANY
(a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

IN THE MATTER OF THE LIBEL OF ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED, V. THE WESTERN FUEL COMPANY.

Petition under the Act of Congress of March 3rd, 1891, of The Western Fuel Company, a corporation, respondent and appellant in Case No. 689 on the records of the Supreme Court of the United States, for a Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding that it certify before the Supreme Court of the United States the entire record in that certain proceeding, to-wit: No. 3195 on the records of said Court of Appeals.

PETITION TO THE SUPREME COURT OF THE UNITED STATES, UNDER THE ACT OF CONGRESS OF MARCH 3, 1891,

For Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Edward Douglass White, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Western Fuel Company, a corporation, respondent and appellant in Case No. 689 on the records of this court—the proceeding being questions certified to this court in Case No. 3195 on the records of the United States Circuit Court of Appeals, for the Ninth Circuit—presents this, its petition for a writ of certiorari addressed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding said court, and the clerk thereof, to certify to the Supreme Court of the United States, the record and proceedings in that certain case pending before it, entitled: The Western Fuel Company (a corporation), appellant, v. Antone Garcia, as administrator of the estate of Manuel Souza, deceased, appellee. The same being No. 3195 on the records of said Court of Appeals, together with its opinion in said case, for the review and determination of said cause by the Supreme Court of the United States, as provided in Section VI of the Act of Congress approved March 3, 1891; and your petitioner respectfully represents, as follows:

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I.

That certain questions arising from the record in the above proceeding, No. 3195 on the records of the United States Circuit Court of Appeals, for the Ninth Circuit, were heretofore, by the said Court of Appeals, duly certified to the Supreme Court of the United States for its decision thereof—the same being on the records of this court, the above numbered proceeding 689—for the October term of 1919.

II.

That there are other questions arising from such record—No. 3195 on the records of said Court of Appeals—which have not been so certified,—upon none of which has the said Court of Appeals expressed an opinion—each of which questions is material and may need to be decided before the rights of the respective parties to the aforesaid proceeding can be determined finally.

III.

That there is but little controversy in said proceeding regarding any fact—on the contrary, the facts as stated in the certificate of the said Court of Appeals need but little amplification.

Souza, the deceased, was familiar with the work of unloading coal, and had on many occasions acted

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as hatch tender for a gang, looking out for the tub, watching for falling coal as the tub was hoisted, and warning the members of the gang in such event. The machinery used by The Western Fuel Company was the most modern, and best adapted for its purpose, known. At the time of the accident, coal was being unloaded by the stevedores from the hold of the vessel, and was being cleaned up from around the interior edges of the vessel by the use of a bucket with rollers underneath it. This bucket was attached to a wire rope, and when loaded was, on a signal from the hatch tender, hoisted some 70 feet in the air above the deck of the vessel to where it hung suspended by 10 or 12 feet of cable from a yard-arm. The engineer in charge of the power then released the gravity control and the bucket ran in on a carrier over the hopper. The hopper, or wooden container, extended about 12 feet from the side of the bunker, and had a lip about 8 feet wide. The bucket, about 3½ feet square, and about 3 feet high at its highest point, when suspended from the yard-arm properly, clears the lip of the hopper by about 2 feet, and swings in some 6 feet from the lip. The bucket is equipped with a contrivance which dumps it by the pull of a clutch. This clutch is pulled by a dump-man standing next the hopper. The libelee Nelson was performing this work at the time of the accident.

On the day of the accident, August 5, 1916, two gangs of stevedores were at work unloading coal. Souza was a member of one gang, the members of

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which were near the hatch at which another gang was working, shortly before 12 o'clock on the day of the accident. Souza's gang was getting ready to go to work, and the other gang were getting ready to quit. Souza went down a little ahead of the time for him to go to work, to take the place of a friend of his, in the other gang, in order that the friend might change his clothes. A bucket was filled, attached to the cable, hoisted and dumped just as all the other buckets were handled; and in the process of dumping, a quantity of coal, varying in amount according to the different witnesses, spilled from the hopper; one or more of the pieces hitting Souza on the head, resulting in his death.

All the witnesses for the libelant agreed in stating that coal is constantly falling, and that the work is dangerous. Souza had worked in unloading coal for years, and had himself been a hatch tender on many occasions. One of the hatch tender's duties is to warn the members of his gang of falling coal.

The trial court found and the finding was approved by the Circuit Court of Appeals that the accident was caused by the negligence of the dump man and the hatch tender.

IV.

That it is the contention of petitioner that in admiralty no cause of action exists to recover dam-

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ages for death through negligence, and that, in order to enable libelant to recover in this case, the right of action must be founded upon the statutes of the State of California. The Statutes of the State of California relating to the matter, so far as is here material, read as follows:

Code of Civil Procedure, Section 377, is as follows:

> "Section 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

This section so far as actions by employees was concerned was amended by Civil Code Section 1970, reading as follows:

> "Section 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; provided nevertheless, that the employer shall be liable for such injury when the same results from

the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive-engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine-shop, or other industrial establishment.

"Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.

"When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order or precedence as herein stated, but no more than one action shall be brought for such recovery.

"Any contract or agreement, express or implied, made by any such employee to waive

the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

"The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

In 1911 the California legislature passed the so-called Roseberry Act (Stats. 1911, page 796) which provides in part:

"Section 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.

"Section 2. No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this act."

The sections of the Statute of Limitations of the State of California pertinent to this case are in the Code of Civil Procedure.

C. C. P., Section 340, Subdivision 3, is as follows:

"Within One Year:

"3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check."

C. C. P., Section 355, is as follows:

"If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

V.

On the foregoing facts material questions of law arise; those certified by the Circuit Court of Appeals of the Ninth Circuit are as follows:

1. Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?

2. If the state statutes do apply, are they to be applied with all their incidents abolishing or modifying the common law defenses of assumption of risk, contributory negligence and the negligence of a fellow servant? or

3. Does the state statute merely give the right of action and leave for application the rules of maritime law covering personal injuries thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes?

And, in our opinion, the following further questions:

4. Are the recognized principles of maritime law modified and changed from state to state in the enforcement of state statutes conferring a right of action for wrongful death?

5. Is there any distinction in the consistent and uniform body of maritime law in the principles governing actions for personal injuries not resulting death, and actions for wrongful death?

6. If the incidents of the statutes of the State of California conferring the right of action for wrongful death with their modifications and abolishments of the defenses of negligence of fellow servant, assumption of risk, and contributory negligence, are to be held to apply in libels in admiralty for wrongful death, should not the statute of limitations of the state also be held to apply?

Petitioner has at all times contended that:

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The right of action for personal injuries resulting in death being given by the state statute, a court in admiralty will enforce it, but enforce it in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law; that the maritime law in actions for wrongful death, as well as in actions for personal injuries not resulting in death, recognizes and applies the defenses of negligence of fellow servant, assumption of risk, and contributory negligence.

The trial court held that the right of action in this case was given by the state statute of California, but that such statute must be applied with all its incidents abolishing and modifying the defenses specified and found that the death of Souza was due to the negligence of the dumpman and the hatch-tender; that the delay in bringing the present action for more than one year after the death of Souza was accounted for so as to remove the bar of the statute of limitations (Apostles pages 159 to 161, inclusive).

On appeal, the Circuit Court of Appeals expressly held that the right of action for the death of the deceased being given by the California statute, the court in admiralty would enforce it, but enforce it in accordance with the recognized principles of the maritime law unaffected by the provisions of any state or local law, and that for this reason the California statute of limitations of one year had no application to the case, and approved the find-

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ings of fact of the trial court that the death of Souza was caused by the negligence of the dumpman and the hatch-tender, and that the deceased was not guilty of any contributory negligence. And found that the deceased had not assumed the extraordinary risk which resulted in his death (Apostles, pages 198-199).

On rehearing the Circuit Court of Appeals reversed the judgment of the court below and directed the dismissal of the action holding that the death of the deceased was due to the negligence of his fellow servants, viz.: the winch-driver and the hatch-tender. It will be noted that Circuit Judge Ross dissented from the order granting appellee's petition for rehearing and vacating and setting aside the decree reversing the judgment appealed from (Apostles, page 209).

The foregoing contentions are not for the first time made—on the contrary, by oral argument and by briefs filed, each of the said contentions was pressed upon the attention of the District Court, and the said Court of Appeals.

The questions certified by the Court of Appeals touch only the questions stated, and the questions not certified, that is, Questions 4, 5, and 6, we deem to be material and important. In the event that the decision of this court on the questions certified shall be adverse to appellee, and the decree in his favor be finally reversed by the said Court of Appeals, contention might be made that the Statute of Limitations of this state did not

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apply. If this court determines that the court in admiralty will not only enforce a right of action for wrongful death given by a state statute, but will enforce it with all its incidents such as the abolition of the defense of negligence of fellow servant, should not the state statute of limitations logically be included as such an incident to be applied? In such event does not the proviso as to limitation likewise attach to the right of action itself?

If, on the other hand, the entire record be ordered certified to this court, all of the questions material to a final decision may be considered at the same time, and a decree be thereupon entered that shall be final.

In the certificate, neither the statutory provisions of the State of California, which need be considered, nor certain facts, that need be considered when the court is deciding the contentions stated in Questions 4, 5, and 6 hereof, are set forth; and we respectfully submit that in the absence of the entire record in the proceeding referred to, the questions above stated, and not certified by the said Court of Appeals, cannot be determined advisedly. If those questions be not material to the decision of the case referred to, then it must follow that the said certificate of the Court of Appeals presents the entire case for this court's decision; which, we submit, may not be so done properly.

And your petitioner prays that on a presentation and consideration of this petition, a writ of

certiorari be ordered issued from this Honorable Court addressed to the United States Circuit Court of Appeals for the Ninth Circuit, and the clerk thereof, commanding said court, and the clerk thereof, to certifiy to the Supreme Court of the United States the entire record in the proceeding pending before it, entitled, Western Fuel Company, a corporation (respondent), appellant, v. Antone Garcia, as administrator of the estate of Manuel Souza, deceased (libelant), appellee; No. 3195 on the records of said Court of Appeals, together with its opinion therein, for the review and determination of said cause by the Supreme Court of the United States, as provided in Section VI of the Act of Congress approved March 3, 1891; and your petitioner further prays that, pending a hearing had on said record so to be ordered certified, no hearing be had on the said questions heretofore certified to this Honorable Court by said Court of Appeals:

And your petitioner will ever pray, etc.

Dated, San Francisco,
February 9, 1920.

FISCHER & FISCHER,
HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Petitioner.

No. 689

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

THE WESTERN FUEL COMPANY
(a corporation),

Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,

Respondent.
(Libelant below)

BRIEF ON BEHALF OF THE WESTERN FUEL COMPANY, PETITIONER, FOR A WRIT OF CERTIORARI

From the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit.

THE RIGHT OF ACTION IS CONFERRED BY STATE STATUTE.

In admiralty no cause of action exists to recover damages for death through negligence.

This court after a review of numerous conflicting decisions in the lower courts has held that in the

absence of federal or state legislation giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for a death caused by wrongful act or negligence on the high seas or navigable waters, in accordance with the principle now well established, that by the common law no civil action lies for an injury which results in death.

1 C. J., 1289.

Where by a state act a right of action is conferred upon the personal representatives of a deceased person to recover damages for his death when caused by the wrongful act, neglect, or default of another, if the tort has occurred on any navigable waters, the courts of admiralty have jurisdiction; this is no departure from the general rule that state laws can neither extend nor restrict the jurisdiction of the admiralty courts, for such a statute merely creates a right, which is separate from the remedy to be enforced in the proper tribunal.

1 C. J., 1290.

> "Under the general maritime law, there is no right of recovery for negligence resulting in death on the high seas or upon navigable waters. The right of action dies with the person and his representatives have no remedy against the individual or the thing which caused his death. This, as is well known, is also the rule of the common law. * * * Congress has never enacted a law to govern similar torts, and the admiralty and maritime jurisdictions in

such matters is controlled by the general maritime law, except as affected by the statutes of a state."

Benedict, 4th Ed., Section 235.

Resort must therefore be had to the state statutes to find a right of action in the libelant.

The statutes of California, mentioned in the petition, confer a right of action for wrongful death.

These state statutes, however, modify and abolish the defenses of negligence of fellow servant, assumption of risk and contributory negligence.

THE STATE STATUTE OF LIMITATIONS.

The state statute of limitations, moreover, if applied, would bar the action.

The statute of limitations, as found in the Code of Civil Procedure of the State of California, Section 340, was pleaded in the exceptions to the original libel and the same section and the plea of laches was alleged in the exceptions to the first amended libel. It will be borne in mind that the first amended libel upon which this cause proceeded to trial contained for the first time, Garcia as administrator, as the libelant. The original libel filed by the widow and her children through their guardian *ad litem*, was filed more than one year after the death of Souza, and the cause of action is therefore barred under the law of California.

"A suit in admiralty to recover damages for death, brought by virtue of a state statute, is governed by the provisions of the statute on which the right of action rests; e. g., the provisions of the statute regulating the time within which such suit must be brought."

Benedict's Admiralty, 4th Ed., Sec. 240,

citing:

Stern v. La Comp. Gen. Trans., 110 F. R. 996;

The A. W. Thompson, 39 F. R. 115,

and other cases.

"While courts of admiralty are not bound by local statutes, in determining the question of laches they govern themselves by the analogies of the common law or statutory limitations, in the absence of special or exceptional circumstances"

1 C. J., 1329, Note 30.

"The only reason why statutes of limitation are regarded in the admiralty at all is that they furnish a convenient measure of staleness. They represent, or ought to represent the settled opinion of the community, as to when there should be an end of litigation, and are therefore more reliable than the views of a judge applied to a peculiar situation."

Davis v. Smokeless Fuel Co., 182 Fed. 1004.

"The policy of statutes of limitation as statutes of repose must be respected in courts of admiralty as much as in courts of common law. In the careful brief furnished by the libelant no case is cited where any suit has been sustained after the lapse of the statutory period."

Nesbit v. The Amboy, 36 Fed. 925;

The Southwark, 128 Fed. 149.

"Where a state statute creating a lien or right of action limits the time within which a proceeding thereon may be begun admiralty will observe the limitation."

The Edith, 94 Fed. 518;

The James G. Swan, 106 Fed. 94;

The Catherine Whiting, 99 Fed. 445;

The H. N. Emilie, 70 Fed. 511.

"Where a cause of action rests wholly on a state statute which requires suits founded thereon to be commenced within a limited time, the proviso as to time attaches to the right of action itself and runs with the statute into the admiralty courts."

Stern v. La Comp. Gen. Trans., 110 Fed. 996.

The libelant alleges the proceedings taken before the Industrial Accident Commission and that through writ of review at the instance of the libelee Western Fuel Company the award was annulled on August 6, 1917. The accident and death of Souza were alleged and proved as of August 5, 1916. The original libel brought by the heirs of Souza was filed August 21, 1917; the first amended libel brought by the administrator was filed three days before the trial.

C. C. P., Section 355, is as follows:

"If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal."

This section was construed in the case of

Fay v. Costa, 2 Cal. App. 241,

wherein it was held in passing upon this very question of statute of limitations, that a writ of review was not an action within the meaning of C. C. P., Section 355. The court said:

> "The judgment in question here was not 'reversed on appeal,' but was annulled and set aside on a writ of review and in order to uphold the action of the trial court we are asked to hold that a reversal on appeal includes an annulling on a writ of review. * * * Our code, in the section just cited (C. C. P., Section 1066) uses the word 'appeal' as indicating something different from a writ of review. While to some minds it may be difficult to suggest a reason why the legislature, in the case of a reversal on appeal, should provide that a new action may be brought, and not when the same result is secured by a writ of review, it seems to be so written. * * * We do not think that we are justified in construing the word 'appeal' as used in Section 355 of the Code of Civil Procedure, as including a writ of review. For the reasons above set forth, the demurrer should have been sustained."

Petition for rehearing in this case was denied in the District Court of Appeal on December 21, 1905, and a petition to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on January 22, 1906.

The libelant plainly bases his excuse for failing to bring the action seasonably upon the proceedings which were improperly taken before the Indus-

trial Accident Commisison, but under the decision last quoted it is shown that the reliance upon C. C. P., Section 355, is ill-founded.

Just as in the case of Fay v. Costa, there was no appeal, but the award in favor of Mrs. Souza was annulled by writ of review, the only remedy available to the Western Fuel Company in the state courts.

In his opinion Judge Dooling on this subject says (Apostles p. 160):

> "As the beneficiaries here were for a year engaged in the prosecution of their supposed rights under the Workman's Compensation Act, their delay in bringing the present action is accounted for so as to remove the bar of limitations. Fill v. Cunard Co., 217 Fed. 84."

If this authority is to be relied upon as establishing the principle that excuse existed for the delay in resorting to the admiralty court by reason of the pendency of the proceedings before the Industrial Accident Commission and the state court, nevertheless there is an entire failure to excuse the commencement of the action by the proper party, viz., the administrator. This was specifically attacked in the exceptions filed to the first amended libel.

The Circuit Court of Appeals held that this state statute of limitations did not apply because the court of admiralty would enforce the right of action

for the death of the deceased (given by the state statute) in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law.

THE CHARACTERISTIC FEATURES OF THE ADMIRALTY LAW MAY NOT BE MATERIALLY INTERFERED WITH BY STATE STATUTES.

The state statutes are to be resorted to only to ascertain whether a right of action is conferred.

In

Southern Pacific Co. v. Jensen, 244 U. S. 205,

this court said:

> " 'Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country * * * And further, that in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.' Concerning extent to which the general maritime law may be changed, modified, or affected by state legislation, this was said: 'No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These

purposes are forcefully indicated in the foregoing quotations from The Lottawanna (Rodd v. Heartt) 21 Wall. 558; 22 L. ed. 654.' Among such quotations is the following: *'One thing however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulations of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states'."* (The italics are ours.)

The deceased stevedore was injured and killed aboard ship while engaged in the performance of a maritime contract of employment.

It is now well settled that the contract of a stevedore is maritime and is governed by the maritime law when the injury occurs aboard ship.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52;

Swayne & Hoyt v. Barsch, 226 Fed. 581.

THE CASE IS GOVERNED BY THE MARITIME LAW.

The law is now well settled and a long list of decisions may be cited in support thereof. A few follow:

The Lottawanna, 21 Wall. 558; 22 L. Ed. 654;

Workman v. Mayor of N. Y., 179 U. S. 555;

S. P. Co. v. Jensen, 244 U. S. 205;
Chelentis v. Luckenbach S. S. Co., 243 Fed. 536; U. S. Adv. Opinion 1917-8, p. 590;
Union Fish Co. v. Erickson, U. S. Adv. Opinion 1918-9, p. 143;
The City of Alexandria, 17 Fed. 390;
The City of Norwalk, 55 Fed. 98; affirmed 61 Fed. 364;
Schuede v. Zenith S. S. Co., 216 Fed. 566;
Tropical Fruit S. S. Co. v. Towle, 222 Fed. 867.

In a number of decisions the courts have so expressly stated that the maritime law will be administered without regard to the rules of law enacted by state legislatures that it may be well to call attention to the specific language employed.

In

Welch v. North Cambria, 40 Fed. 655,

the court said

"* * *. The states have no power to interfere with the admiralty system of laws".

In

The Chusan, Fed. Cas. 2717,

the court said:

"In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer."

In

Mack S. S. Co. v. Thompson, 176 Fed. 499,

the court said (p. 504):

> "We think the maritime law subsists as an entirety as the subject of federal jurisprudence, and is to administered by the federal courts *without impairment by state legislation.* If changes are to be made in it, it must be done by federal authority." (Italics ours.)

In

The H. B. Hyde, 195 Fed. 312,

it was said:

> "The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. The right of action arising out of a maritime tort, relating to the recovery of damages for personal injuries, depends upon the maritime law, which has been adopted by the laws and usages of the country."

The foregoing decision was expressly approved by the court in

Swayne & Hoyt v. Barsch, 226 Fed. 581,

the court saying that the rule there announced *"is well settled"*.

The trial court found and the Circuit Court of Appeals approved the finding:

> "That the death of Souza was caused by the negligence of the hatch-tender in withdrawing the bucket from the hopper before it was fully dumped, and to his negligence in not giving warning to those in the hold where Souza was working as a stevedore and killed."

THE MARITIME LAW.

Under the maritime law "unaffected" in the language of the decisions, "by the provisions *of any state or local law*," there is no liability for an injury sustained by or through the negligence of a fellow servant.

The fellow servant rule was stated to be a governing principle in admiralty in

Olson v. Oregon Coal & Nav. Co., 104 Fed. 574,

Judge Ross saying:

> "It is very clear that upon common-law principles the owner would not be liable for an injury sustained by one of such employees by reason of the negligence of one of his co-employees, whatever his grade in the common employment. In the recent case of Railroad Co. v. Conroy, 175 U. S. 323; 20 Sup. Ct. 85, Adv. S. U. S. 85; 44 L. Ed. 181, where the case of Railroad Co. v. Ross, 112 U. S. 377; 5 Sup. Ct. 184; 28 L. Ed. 787, was finally and squarely overruled, the supreme court announces the true rule to be, both upon principle and authority, 'that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same

general end.' It is true that the present case is to be determined, not by the common law, *but by the rules of the maritime law; but that law, as was shown very clearly, we think, by Judge Brown in the case of The City of Alexandria, supra, is, in respect to the facts here presented, the same.* See also, the cases of The Queen (D. C.), 40 Fed. 694; The Frank and Willie (D. C.), 45 Fed. 494; The City of Norwalk (D. C.), 55 Fed. 98; Steamship Co. v. Merchant, 133 U. S. 375; 10 Sup. Ct. 397; 33 L. Ed. 656. The judgment is affirmed." (Italics ours.)

The same governing principle was followed by the court in the following cases:

The Troop, 128 Fed. 858;

The Westport, 136 Fed. 391;

The C. S. Holmes, 220 Fed. 273.

All of the District Judges of the Ninth Circuit have followed these decisions upon this point.

In

The Rosalie Mahony, 218 Fed. 695,

Judge Cushman applied the rule to the case of a stevedore injured aboard ship. He there said:

"Even if it were conceded that the load put upon the truck was unusually high and large, and that that fact contributed to its falling, yet would the act of so loading the truck be the act of a fellow servant. Olson v. Oregon Coal & Navigation Co., 104 Fed. 574; Hermann v. Port Blakely Mill Co., (D. C.), 71 Fed. 853. * * * Libelant contends that the case of Olson v. Oregon Coal & Navigation Co. is not controlling, because in that case the vessel was being navigated at sea and not being loaded

> within the state's jurisdiction; *but the decision clearly holds that the maritime law and the common law in respect to the fellow servant rule are the same*, and the chief case relied upon as authority by the court in Olson v. Oregon Coal & Navigation Co. was Quinn v. Lighterage Co., (C. C.), 23 Fed. 363, where libelant was injured through the negligence of the master of the vessel in giving a premature order and setting the winch in motion while the vessel was being loaded." (Italics ours.)

In

> Hermann v. Port Blakely Mill Co., 71 Fed. 853 (p. 863),

Judge Morrow, for the reason that the injury was caused by the negligence of a fellow servant, dismissed a libel brought by one engaged in loading the "Kate Davenport," saying:

> "In my judgment, the libelant in this case was injured through the negligence of a co-employe, who, in law, is deemed to be a fellow servant, and not a vice-principal. The employer discharged his full duty towards libelant when he provided a competent person to give the warning signals. Having done that, his responsibility for any injury sustained through the negligence of such co-employe to libelant was protected by the general rule which exempts employers from liabilty for injuries sustained through the negligence of fellow servants. Libelant, by his contract of employment, impliedly assumed all the ordinary risks of the business in which he was engaged, among which the negligence of fellow servants is recognized as one of the risks."

See also,

Bowes v. Baumert, No. 3155 Circuit Court of Appeals, Ninth Circuit (not yet reported).

There is no distinction in principle, nor we believe to be found in precedent, in the application in admiralty of the doctrine of the defense of negligence of fellow servant, between actions for personal injuries not resulting in death and actions for wrongful death.

If such a distinction is now to be drawn, will the proper harmony and uniformity and the characteristic features of the general maritime law be maintained? Will not the different modifications made by the various state statutes in their incidents relating to various defenses inevitably destroy such harmony and uniformity?

If such incidents to state statutes are to be applied by the court of admiralty, must it not logically also apply, the further incident of the state provision limiting the time within which the action may be commenced.

Dated, San Francisco,
February 9, 1920.

Respectfully submitted,

FISCHER & FISCHER,
HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Petitioner.

No. 689

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

THE WESTERN FUEL COMPANY
(a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

NOTICE OF MOTION.

To Antone Garcia, as administrator of the estate of Manuel Souza, deceased, respondent in the foregoing petition; and to C. M. Bradley, Esq., and Henry Heidelberg, Esq., proctors for said respondent:

You, and each of you, are hereby given notice that the Western Fuel Company, petitioner in the foregoing petition, will, at the courtroom of the Supreme Court of the United States, in the Capitol

Building, at the City of Washington, D. C., and on the opening of said court on Monday, the ~~first~~ 22nd day of March, 1920, or so soon thereafter as proctors for said petitioner in said matter may be heard; present the foregoing petition to said Supreme Court, and thereupon move the said court for an order that the writ of certiorari in said petition prayed for be issued, and that the prayer of said petition be granted.

Dated, San Francisco,
February 9, 1920.

FISCHER & FISCHER,
HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Petitioner.